

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FISHER,	.
	.
Plaintiff,	.
	. Case No. 13-cv-05549
vs.	.
	. Newark, New Jersey
SCHOTT, et al.,	. July 28, 2014
	.
Defendants.	.
	.

TRANSCRIPT OF HEARING: ORAL ARGUMENT - EXCERPT
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Commencement of excerpted proceedings at 3:31 P.M.)

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3 THE COURT: All right. This is the matter of Lisa
4 Fisher versus Schott, et al., Civil No. 13-5549. Can I have
5 appearances, please, starting with plaintiff.

6 MR. DWYER: Good afternoon, Your Honor, Andrew
7 Dwyer from the Dwyer law firm for the plaintiff Lisa Fisher.

8 MR. EDELL: Good afternoon, Your Honor, Marc Edell
9 for Judge Schott from the law firm of Genova Burns --

10 THE COURT: Genova Burns?

11 MR. EDELL: -- Giantomasi & Webster.

12 THE COURT: All right.

13 MR. EDELL: Sorry.

14 MR. GENOVA: Good afternoon, Your Honor, Angelo
15 Genova from the law firm of Genova Burns Giantomasi &
16 Webster.

17 MS. SCOTT: Good afternoon, Your Honor, deputy
18 attorney Susan Scott for the State defendants.

19 THE COURT: I figured yours would be easier, okay.

20 MR. NESTOR: Good afternoon, Judge, Bill Nestor on
21 behalf of Judge Schott also from Genova --

22 THE COURT: The Genova firm?

23 MR. NESTOR: Giantomasi & Webster --

24 MR. EDELL: He's licensed at Genova Burns, but I
25 didn't know whether I should -- try to do it all.

1 MR. GENOVA: It's okay.

2 THE COURT: All right. Have a seat.

3 All right. So we have a number of issues in front
4 of us, all rather interrelated concerning discovery. I have
5 carefully reviewed the parties' submissions. I've read the
6 briefs, the certifications and/or declarations and exhibits
7 thereto.

8 So if there's anything -- let me start with the
9 defense, since it's their application -- that you want to
10 add, I'll be happy to hear you. But I can assure you I've
11 reviewed everything. So -- just keep that in mind.

12 So who's going to take the lead. Anyone?

13 MR. EDELL: I'd like to take the lead, Your Honor.

14 THE COURT: Go ahead.

15 MR. EDELL: In light of the fact that you've
16 reviewed everything, I just prepared just some demonstrative
17 exhibits.

18 THE COURT: In addition to those that are already
19 submitted or --

20 MR. EDELL: No, just for today.

21 THE COURT: Okay.

22 MR. EDELL: That I think might facilitate our
23 discussion.

24 THE COURT: Okay.

25 MR. EDELL: If I could hand a copy --

1 THE COURT: Yes, does Mr. Dwyer have a copy of
2 that?

3 MR. EDELL: I'll give it to him right now. I think
4 it'll help illustrate the extensive nature and the issues
5 that are involved.

6 THE COURT: Okay.

7 MR. EDELL: So the first in these demonstrative
8 exhibits is the calendar for November 2012.

9 THE COURT: Mm-hmm.

10 MR. EDELL: This illustrates vacation time that was
11 taken by the plaintiff and approved by Judge Schott. Judge
12 Schott under the court policies has the responsibility for
13 deciding whether to approve or not approve vacation time.
14 And in November, the plaintiff -- of 2012, the plaintiff came
15 to Judge Schott and said, I'd like to take vacation to go to
16 Virginia to take care of my father.

17 THE COURT: Right.

18 MR. EDELL: So we have this time frame to deal
19 with.

20 We also have the application for FMLA leave in
21 December from the 10th to the 26th. And the remaining time
22 period during November is relevant to see what preparation
23 the plaintiff made in anticipation of going on FMLA leave, if
24 anything. There are issues of whether she did or did not
25 take the vacation time to go down and take care of her

1 father. The issues of veracity permeate every aspect of this
2 case and, in fact, is the basic reason why Judge Schott chose
3 to replace the plaintiff as her confidential judicial
4 secretary.

5 December, we have, as I marked in yellow, the dates
6 that the plaintiff was given for her FMLA leave to go
7 Virginia and take care of her father. It's from December
8 of -- 10th, 2012, through December 26th, 2012.

9 And from Exhibit U that we've submitted to the
10 Court, we know that the plaintiff on December 10,
11 December 11, December 12, December 18, December 20th,
12 December 21st, December -- the 21st, that's the last date,
13 posted on her Facebook, posted posting statements on her
14 Facebook from New Jersey -- from cell towers in New Jersey
15 when she was supposed to be in Virginia. She executed
16 requests for admissions stating that she was in Virginia when
17 she wasn't. In addition, we've subpoenaed the Sprint records
18 which indicate that her Sprint phone, the only phone that she
19 says she has, was never used during the time frame
20 December 10 through December 26.

21 THE COURT: Wait, I'm sorry, tell me that part
22 again.

23 MR. EDELL: We subpoenaed her Sprint records.

24 THE COURT: Right. And so for at least certain
25 parts of that December time frame, you're saying she was in

1 New Jersey.

2 MR. EDELL: For the entire period of time
3 December 10 through December 26th, those records as reflected
4 in themselves and in the certification of the person who is
5 in charge of those records certify that her phone was only
6 used in the Sprint system in New Jersey and nowhere else.
7 The plaintiff has admitted by failing to respond to requests
8 for admissions that she purportedly had her phone with her in
9 Virginia on the dates in question, meaning that she didn't
10 have anybody else's phone with her when she was in Virginia.

11 So there's an argument in this case that suggests
12 that this is a fishing expedition. This is not a fishing
13 expedition. The -- the whereabouts of Ms. Fisher in November
14 and in December are critical, not only in the -- in terms of
15 the phone records, but in terms of all aspects of her social
16 media, various postings, communications, her children were
17 coming home from college. There's a myriad of people with
18 whom she was communicating with at that time, at a time when
19 she purportedly and says under oath that she was in Virginia
20 taking care of her father under her FMLA leave.

21 THE COURT: But I did not understand Mr. Dwyer's
22 argument to necessarily be that any inquiry involving social
23 media would be a fishing expedition or beyond the bounds. It
24 was breadth of the request that he objected to.

25 MR. EDELL: Well, that's what I'm getting to,

1 Judge.

2 THE COURT: Okay.

3 MR. EDELL: I'm getting to the breadth of -- of the
4 request.

5 We then have the period the 27th, 28th, 31st, and
6 the 2d when the plaintiff decided to take sick days and
7 vacation days instead of coming back to work without
8 permission from Judge Schott. And the -- what she was doing,
9 where she was, and who she got permission from and who she
10 was communicating to, respecting -- with respect to those
11 issues are critical in terms of judging and assessing her
12 veracity and her statements that Judge Schott -- somebody
13 else other than Judge Schott was the one who approved the --
14 the vacation time and the sick time.

15 If we turn to the January 2003 [sic] exhibit, this
16 is for her leave from the 10th of January through the 15th of
17 January for a back problem. This was basically FMLA leave
18 for her own disability. So we have the veracity of her claim
19 that she had a back problem, who she was dealing with, where
20 she was, what she was doing, and -- to determine whether or
21 not she had a back problem at all.

22 Then she took FMLA leave for disability. Now, this
23 disability is a disability that she claims arose as a result
24 of --

25 THE COURT: What period are we on now?

1 MR. EDELL: If you take a look on the 24th,
2 Your Honor.

3 THE COURT: January 24th. Beginning there. Right?

4 MR. EDELL: Yeah, beginning there through
5 February --

6 THE COURT: Looks like -- yeah --

7 MR. EDELL: -- going through March.

8 THE COURT: April 2d.

9 MR. EDELL: Up to April 2d. Her -- her claim for
10 that disability was the following: Patient is suffering from
11 severe stress, anxiety, due to familial as -- and
12 work-related issues. So we have to see what was going on in
13 terms of her family life for that entire period of time, what
14 problems the family was -- family was having, who she was
15 communicating with in the family, whether she was even having
16 those problems at that point in time.

17 Secondly, we have the issue of work-related issues.
18 What was she communicating and to whom, and what was she --
19 what was she discussing on social media with respect to the
20 cause of her problems.

21 Finally, the -- the basis for her FMLA leave for
22 the month of January, February, March, and part of April was
23 that she's unable to concentrate or focus on any assignments.

24 Now, Judge, that in and of itself, the ability to
25 concentrate will be evidenced in her social media. Is she

1 communicating coherently with other people? Is she able to
2 focus on issues that are being raised by other people?

3 That's why the scope of this is so broad. We
4 didn't create these issues. These are issues that were
5 created by the plaintiff. She says she can't do any of this.
6 Now, if she can't concentrate and she can't focus, how is she
7 going to be communicating on her social media effectively?
8 So every entry, actually, becomes a question or evidence of
9 whether she was or wasn't focusing and concentrating in
10 addition to the substantive issues.

11 Finally, she says she gets panicky when around
12 people. Well, let's take a look at her social media and see
13 what her schedule was. Let's see what the -- the pictures
14 that she -- she has. Let's see who -- who she was hanging
15 out with.

16 THE COURT: Wait, I'm con- -- one part, though,
17 that I'm not sure I understand is, obviously, Exhibit U
18 includes quite a bit of what looked to be screen shots from
19 her social media, right, including Facebook?

20 MR. EDELL: Correct, Judge. That's just a -- the
21 public Facebook.

22 THE COURT: Right. The public Facebook.

23 Why is that not enough to delve into or give you
24 what you think you need in terms of her coherence, her state
25 of mind? For example, you really want every single private

1 message she may have had with an immediate relative or a
2 child?

3 MR. EDELL: To understand the nat- -- she's
4 alleging, Judge, that she would -- I haven't even gotten to
5 the fact that -- I mean, we're talking about suffering from
6 severe stress and anxiety in addition to -- excuse me -- her
7 claim for damages in this case.

8 So we have to assess the -- the -- the damages.
9 Are the damages that she claims she's experiencing, both
10 emotionally and physically, accurate or not?

11 THE COURT: Well, there's all sorts of tools that a
12 party has at their disposal to do that. For example,
13 obviously, you'll get to depose her. She'd be -- will
14 submit, of course, I'm sure to an IME. You may even refer
15 to -- or resort to using a psychologist or a psychiatrist to
16 do a report.

17 Now, I know you're going to tell me, well, yeah,
18 those -- those are tools, but we also have this, which means
19 it's discoverable. Right?

20 MR. EDELL: Right. The only -- the only difference
21 between documents, Your Honor, and what we're talking about
22 in social media is one's electric and one's not.

23 THE COURT: Right. But that's a distinction
24 without a difference. That assumes you're equally entitled
25 to the hard-copy documents.

1 MR. EDELL: I'm -- I'm entitled to documents that
2 are relevant or reasonably calculated to lead to the
3 discovery of admissible evidence.

4 THE COURT: Yes.

5 MR. EDELL: So if -- if she has social media that
6 relates to any of the issues that we just discussed, the fact
7 that she was suffering from severe stress and anxiety due to
8 familial and work-related issues, that she's unable to
9 concentrate or focus on any assignment, think of the -- all
10 the different kinds of communications that relate to that.
11 And that she gets panicky around people. Well, if she's
12 sitting there so- -- and there's evidence that she's
13 socializing, Judge, that's hard, concrete evidence that
14 contradicts her claim. It's -- we're not relegated to having
15 an expert examining -- examine her and then have a battle of
16 the experts.

17 THE COURT: But you're assuming, for example, that
18 there's material in there that will show that she was
19 socializing. You're working on an assumption. And if that's
20 an assumption, how is that not a fishing expedition? You're
21 saying your -- your reasoning goes like this: Judge, because
22 a lot of people who use Facebook tend to document their
23 various activities and because if she did that and if those
24 activities included socializing with others, then that would
25 be discoverable to show that she has paranoia in dealing with

1 other people. Putting aside the fact that she may have
2 paranoia dealing with -- assuming any of it's true --
3 assume -- and I am not making an assessment of that at this
4 point, it's not for me to assess. Assuming that she's either
5 failing or inartfully drawing a distinction, a qualitative
6 distinction, between somebody who does give her paranoia and
7 somebody who doesn't, you're assuming any of that's in there,
8 and we don't even know.

9 MR. EDELL: Yes, we do, Judge.

10 THE COURT: So how is that not a fishing
11 expedition?

12 MR. EDELL: It is not a fishing expedition. It --
13 we already know that there's solid evidence in her public
14 Facebook that relates to a significant number of issues.

15 THE COURT: Look, I agree with you with respect to
16 the cell phone data and her whereabouts during the period she
17 was allegedly taking care of her father. There's no doubt --
18 in fact, I am not even sure whether the plaintiff would
19 argue, Mr. Dwyer, would argue against that being
20 discoverable.

21 The question is not whether that's discoverable.
22 The question is what else is discoverable.

23 So why wouldn't those records be limited, for
24 example, to any postings, messages or -- pertaining to her
25 whereabouts?

1 MR. EDELL: Limited to -- to that --

2 THE COURT: For the period of --

3 (Simultaneous conversation)

4 MR. EDELL: It should include that, Judge. But it
5 should include any posting that relates to any of the issues
6 that are the subject matter of this litigation, including her
7 allegations of liability, including her whereabouts,
8 including her injuries, all of those issues are relevant.
9 And may --

10 THE COURT: But they're relevant at different
11 times. In other words, --

12 MR. EDELL: Yes, they are relevant to -- at
13 different times. And there -- that's why the period of time
14 is as extensive as it is.

15 THE COURT: But those various periods may each be
16 relevant in their own way. So, for example, right, in
17 December -- from December 10th, 2012, until December 26th,
18 2012, the issue is was she really in Virginia taking care of
19 her father. Now, you say you have cell phone data records or
20 cell tower location records that show that the phone, at
21 least, was in New Jersey, and she's already admitted by
22 having failed to deny that she always had her cell phone with
23 her.

24 So why wouldn't any inquiry for records on those
25 days be limited to her whereabouts?

1 At that point, she hadn't claimed paranoia in
2 dealing with other people, had she?

3 MR. EDELL: No. She didn't -- she is -- well,
4 let's -- let's if we want to go back in time, Judge, her
5 psychiatric problems began in 2008. We didn't know about
6 until we started doing our discovery. So those -- those
7 records also relate to whatever family problems she was
8 having at the time.

9 THE COURT: Which -- wait, which records? Her
10 psychiatric records? Which --

11 MR. EDELL: The -- no, the records -- the social
12 media records for the time period of December -- December
13 through the entire period of time. Her psychiatric and
14 familial problems and stress predate any of these problems
15 are.

16 THE COURT: Right, but that's not --

17 MR. EDELL: So it can predate it and it can be
18 exacerbated thereafter, or it may be revealed that, in fact,
19 she didn't have all of these problems.

20 THE COURT: Okay.

21 MR. EDELL: And the -- you know, the cases are
22 pretty clear. I mean, New Jersey -- there's not one New
23 Jersey case cited by Mr. Dwyer that doesn't -- that suggests
24 that we're not entitled to have these documents --

25 THE COURT: At the end of the day, isn't -- isn't

1 the point of the case law essentially that social media
2 discovery is to be treated no differently than other forms of
3 documentary discovery? In other words, how I assess a
4 relevance inquiry under for Facebook is really no different
5 than how I would assess a relevance inquiry for, say,
6 business records or emails. Right?

7 MR. EDELL: Exactly.

8 THE COURT: Okay. Right.

9 MR. EDELL: And I'd like to -- you know, the -- I'd
10 like to even point out the -- Mr. Dwyer cites a case --
11 Mr. -- Mr. Dwyer cites a case Giacchetto v. Patchogue-Medford
12 Union Free School District (E.D.N.Y.), and he -- he says was
13 a disability discrimination case. And he cites for the
14 proposition that you can't just go ahead and -- and have a --
15 have a request for social media.

16 And the court -- and he suggests that the court
17 rejected the plaintiff's entitlement to that. He says the
18 fact of the -- that the defendant is seeking social media
19 networking information as opposed to traditional discovery
20 materials does not change the judge -- the court's analysis.
21 The fact that an individual may express some joy --
22 et cetera, et cetera.

23 If the court were allowed to -- to allow broad
24 discovery of plaintiff's social networking posting as part of
25 the emotional distress inquiry, then there would be no

1 principal reason to prevent discovery to every personal
2 communication. Thus, a plaintiff's entire social networking
3 account is not necessarily relevant because he or she is
4 seeking emotional distress.

5 And I agree with that, Judge.

6 But what the case really holds is that it's -- it's
7 virtually impossible for the opposing party to say which of
8 any of these postings, without looking at them, are relevant.

9 I think we've made a prima facie showing that she
10 creates information in her social media that has been
11 relevant to this litigation, both in terms of her -- her
12 state of mind and where she was and what she was doing and
13 the fact that she's lied to -- under oath and she's committed
14 a fraud under the FMLA Act and the like.

15 So what -- what did the court in Giacchetto do?
16 The court in Giacchetto didn't deny the discovery of all of
17 the social media. What they said -- well, what the court
18 said was that the plaintiff must produce any specific
19 references to the emotional distress she claims she suffered
20 or treatment she received in connection with the incidents
21 underlying her amended complaint; e.g., references to a
22 diagnosable condition or visits to a medical professional.
23 Moreover, in seeking emotional distress damages, plaintiff
24 has opened the door to discovery into other potential
25 sources, causes of that stress. Thus, any posting on social

1 network websites that refer to an alternative potential
2 stressor must be produced.

3 That's what this court that he says denied the
4 application, plaintiff's -- defendant's application, ruled.
5 These materials are to be served upon defendant's counsel as
6 directed in section (B) (4) below: Physical damages.
7 Defendants also seek information bearing on plaintiff's claim
8 for physical damages, posting or photographs on social
9 networking websites that reflect physical capabilities
10 inconsistent with plaintiff's claims -- injury, are relevant,
11 and therefore they are to be produced.

12 Same as -- same information that I am discussing
13 with you here. But there was a question in this case as
14 to -- the -- the underlying facts of where -- where this
15 person was and what this person's doing on occasions that
16 she's -- swore under oath she was somewhere else.

17 Allegations in the amended complaint. Defendant
18 also seeks any accounts of the events alleged in the
19 plaintiff's amended complaint, contradictory or otherwise.
20 Such information is relevant, and to the extent such
21 information exists on any social networking account
22 maintained by the plaintiff, plaintiff must produce that
23 information. Plaintiff is therefore required to produce, as
24 directed in section (4) (B) below, any social networking
25 posted -- posting that refer or relate to any of the events

1 | alleged in the amended complaint.

2 | Events, I would suggest, should also encompass any
3 | claims of damage, Your Honor, because they're included in the
4 | complaint also.

5 | The court finds the following as the approach that
6 | should be taken: Ordering plaintiff's counsel to access
7 | plaintiff's social media accounts and produce responsive
8 | information as opposed to having plaintiff provide defendant
9 | with her user name and passwords. This court finds that the
10 | approach utilized in Howell [phonetic] to be persuasive and
11 | reasonable. Therefore, the accounts -- the court directs
12 | that plaintiff's postings be reviewed for relevance by
13 | plaintiff's counsel and that plaintiff's counsel, not
14 | plaintiff, make a determination regarding the relevance of
15 | the posting, keeping in mind the broad scope of discovery
16 | contemplated by Rule 26.

17 | And then it's -- it cites another case directing
18 | plaintiff's counsel to review plaintiff's social networking
19 | information for production, holding that counsel for
20 | producing party is the judge of relevance in the first
21 | instance.

22 | The footnote goes on to say: This approach can
23 | lead to results that are both too broad and too narrow. On
24 | the other hand, a plaintiff should not be required to turn
25 | over the private section of his or her Facebook which may or

1 may not contain relevant information, merely because the
2 public section undermines the plaintiff's claims.

3 Like here.

4 On the other hand, a plaintiff should be required
5 to review the private section and produce any relevant
6 information regardless of what is reflected in the public
7 section. The Federal Rules of Civil Procedure do not require
8 a party to prove the existence of relevant material before
9 requesting it.

10 I -- it's not my obligation to prove that it's
11 relevant -- that it's relevant, Your Honor. My obligation is
12 to show that it's probably relevant or reasonably likely to
13 lead to the discovery of admissible evidence.

14 And I think I've shown that in a prima facie way
15 with the public Facebook.

16 Furthermore, this approach -- let's see, the
17 existence -- furthermore, this approach improperly shields
18 from discovery the information of Facebook users who do not
19 share any information publicly. For all the foregoing
20 reasons, the court will conduct a traditional relevance
21 analysis.

22 And, Your Honor, there are -- there are myriad
23 cases that talk about the fact that anything that's relevant
24 or reasonably calculated to lead to discovery of admissible
25 evidence in social media that relates to any of the issues,

1 damages, cause of damages, veracity are clearly relevant and
2 discoverable.

3 Now, the Court has -- it has a choice. Under the
4 broad protective order here, we have in place here, all of
5 this information is protected. It can be marked
6 confidential. It can be marked attorney's eyes only. And we
7 can then have the satisfaction of knowing that we're getting
8 the relevant information, because assessment of relevancy is
9 somewhat subject.

10 I only pointed that -- that out and the fact that
11 that court ruled that this information was relevant and was
12 discoverable and chose a different means by which to make
13 that assessment to -- to show -- to show that Mr. Dwyer
14 quoted that case out of context.

15 THE COURT: Okay. All right. Anything else?

16 MR. EDELL: Yes, Judge.

17 THE COURT: Remember, I've read all the briefs and
18 the exhibits.

19 MR. EDELL: Yeah -- okay.

20 THE COURT: Because we've already -- you've already
21 been going for over half an hour just on this one point.

22 MR. EDELL: Okay. I -- I'm -- I will concede that
23 the relief for sanctions, we'll have to abide the production
24 of the social media and a certification from plaintiff's
25 counsel, if Your Honor's going to let him do it, that all the

1 social media that was created has not been deleted or
2 destroyed in any way.

3 THE COURT: All right. Perhaps I'm confused. So
4 we can agree, can't we, that in order to impose an adverse
5 inference, there has to be actual suppression or withholding
6 of the evidence. Right?

7 MR. EDELL: Yes, Your Honor.

8 THE COURT: Okay. That's what the court said in
9 MOSAID, and that's what the Third Circuit has held.

10 MR. EDELL: I agree.

11 THE COURT: Okay. There hasn't been a shred of
12 evidence yet of actual destruction of anything. Right?

13 MR. EDELL: Yes, Judge --

14 THE COURT: So the spoliation application is
15 grossly premature, isn't it?

16 MR. EDELL: It was as an alternative. I didn't
17 know --

18 THE COURT: An alternative to what? There's been
19 no -- demonstrated destruction.

20 MR. EDELL: We never --

21 THE COURT: The only thing that's -- that speaks on
22 the subject is the declaration of Ms. Fisher whoself --
23 herself, who says in very clear and uncertain terms -- and I
24 understand you have issues with her credibility, I certainly
25 understand that. But it says in very clear and uncertain

1 terms that she hasn't deleted anything since well before she
2 saw -- she filed this lawsuit. Right?

3 MR. EDELL: That's what she says. That's why I --

4 (Simultaneous conversation)

5 THE COURT: And I understand. You've got
6 credibility issues with her. I get that.

7 (Simultaneous conversation)

8 MR. EDELL: That's why I said, Judge, I'm -- I'm
9 not pursuing that in this juncture.

10 THE COURT: Okay. Fine.

11 MR. EDELL: Until I get a certification from
12 plaintiff's counsel, if he's the one who's going to be
13 charged with reviewing this material and making the
14 assessment of whether or not the plaintiff did or did not
15 delete certain information from her social media, or I'd be
16 happy to review it; I'd be more than happy to review it.

17 THE COURT: I'm sure you would. Generally,
18 though --

19 MR. EDELL: To make that determination.

20 THE COURT: This being similar to any other
21 discovery issue and in any other discovery issue, I can at
22 least tell you, I don't go into discovery issues or discovery
23 production assuming that there's going to be an issue about
24 suppression or withholding. If that issue unfolds, if it
25 develops, as I've demonstrated in other cases, we are more

1 | than prepared to deal with it.

2 | But you're raising it as an issue, and I have no
3 | way of knowing whether it's ultimately going to be an issue.

4 | MR. EDELL: I agree with you, Judge.

5 | THE COURT: Okay.

6 | MR. EDELL: It was meant to -- to be included as an
7 | alternative.

8 | THE COURT: Okay.

9 | MR. EDELL: We didn't get the information. There
10 | was -- obviously we tried to get this information for months
11 | and months and months and months and were only thwarted in
12 | that effort by Mr. Dwyer.

13 | THE COURT: Well, not because of a spoliation
14 | issue, but because the parties have been fighting about the
15 | discovery. It's a relevance issue.

16 | MR. EDELL: We never got a chance to get it before
17 | Your Honor.

18 | THE COURT: All right. That's a separate issue
19 | than suggesting spoliation.

20 | So what else did you want to argue, Mr. Edell?

21 | MR. EDELL: I want to argue the sanction issue,
22 | Your Honor, against Mr. Dwyer.

23 | THE COURT: Okay.

24 | MR. EDELL: We began trying to obtain discovery
25 | from Mr. Dwyer as far back as May 6th, 2014. And Your Honor

1 instituted a format for conducting and resolving discovery
2 disputes. Your Honor required the parties to prepare joint
3 submissions to the Court identifying outstanding discovery
4 issues and memorializing the parties' respective position,
5 including whatever applicable case law there may be on the
6 subject. And we were first told to submit that joint
7 submission on May 28th, 2014. But Mr. Dwyer failed to
8 participate in that process. And on the 28th, he requested
9 an extension of time to submit his client's position.

10 Thereafter, the plaintiff requested additional
11 extensions, which, again, were granted.

12 On June 9 of 2014, counsel for plaintiff requested
13 the Court to grant yet another extension, which the Court --
14 Your Honor has been very, very generous to Mr. -- Mr. Dwyer.
15 He says he's on -- on trial, and it's a magic word:
16 Automatically, he gets an extension.

17 And Your Honor gave him to the 16th. However, the
18 16th comes and gone -- comes and goes. No -- nothing from
19 Mr. -- Mr. Dwyer in that joint submission.

20 On the 16th, he requests again another extension
21 from Your Honor. And Your Honor gave him until the 30th to
22 participate in this joint submission.

23 The 30th comes and goes, and Mr. Dwyer fails again
24 to participate in the process.

25 On June [sic] 1st, we -- we say enough is enough.

1 Let us file a motion, because we're not getting any
2 cooperation from Mr. -- Mr. Dwyer in this respect.

3 Mr. Dwyer didn't respond. He didn't object.

4 On July 7, we submitted a letter asking, again, to
5 be permitted to file a motion and, again, Mr. Dwyer did not
6 object or respond to that letter.

7 On July 8th, Your Honor ordered that the parties
8 appear on July 10, 2014. And Mr. Dwyer failed to appear on
9 that date.

10 And, Your Honor, I think that -- I'm glad that we
11 ordered the transcript of that proceeding, because it clearly
12 reveals how misleading Mr. Dwyer was with respect to where he
13 was and what he was doing.

14 The Court asks -- asks Mr. Dwyer: Now, Mr. Dwyer,
15 the Court had ordered the parties to -- or counsel to appear
16 in court. Why is it that you are not here, sir?

17 Dwyer: I apologize, Your Honor --

18 Which is what he does. He'll get into court and
19 he'll say I'm so sorry, Judge. I have no excuse. But on the
20 outside, he's a hard-nosed, give -- you know, give-no-shelter
21 litigator.

22 And he says: Your Honor, I'm on trial in Mercer
23 County. And I obviously missed the order on the ECF. I
24 don't have a better excuse than that.

25 And then he says -- and then Your Honor says:

1 Well, I understand if you're on trial, and I appreciate your
2 candor, Mr. Dwyer. As I've repeatedly advised, I do not
3 think -- I do not participate in the joint protocol -- if you
4 do not participate in the joint protocol, you run the risk
5 that your right to take any position on the discovery dispute
6 may be waived. I am not going to do that yet, at least
7 because I understood, Mr. Dwyer, that you're in trial.

8 And I asked for a waiver, Your Honor.

9 And then he says: All right.

10 Mr. Dwyer: I am off tomorrow, so I mean, I can do
11 this tomorrow, Judge.

12 And then I butt in, Judge, because I sincerely have
13 had a track record which has been very difficult with
14 Mr. Dwyer.

15 And I said: Mr. Dwyer plays two roles, one, the
16 hard --

17 THE COURT: Wait, you know what? Let's -- let's
18 shortcut this, Mr. Edell. I have the transcript. I've read
19 it. And I was there. So you don't need to read it. Just
20 argue your points, and I'm happy to listen.

21 MR. EDELL: Judge, he doesn't -- Your Honor
22 straight-out asks him: Are you on trial?

23 And he -- and he actually says -- where is it?

24 This is what he says: Okay. The case is Mercer --
25 versus Mercer -- in Mercer County, it's before Judge Massi.

1 The case is Marisa Huerta versus Princeton. We're not in
2 court today. We are doing jury selection next week. We are
3 doing *in limine* motions and going through preliminary
4 evidentiary issues this week. I was on trial all day Monday,
5 Tuesday, Wednesday, and at the end of the day yesterday, the
6 judge said he wanted me and defense counsel to conference
7 over trial exhibits and then to conference with the court
8 regarding the court's ruling on various *in limine* motions,
9 how that was going to affect the schedule. And then like I
10 said, I'm off trial because tomorrow's a motion day.

11 And then Your Honor says: Hold on. We're not that
12 far yet. Are you or are you not in court today? Or did you
13 have a reasonable expectation of being in court today?

14 Mr. Dwyer: No, I am not in court today.

15 And then he blames -- he uses as an excuse, I
16 didn't get the order on the ECF.

17 Well, he has two associates in his office who are
18 counsel of record in this case -- they've both filed notice
19 of appearances in this case -- who received copies of this,
20 Judge.

21 And it -- I -- it begs credibility that he didn't
22 know about it.

23 Secondly, Your Honor, he -- Your Honor then sets
24 out a -- a scheduling for the filing of the briefs. And you
25 give me until the 16th by the close of business. And I file

1 it.

2 You give Mr. Dwyer to the 23d by the close of
3 business. And he doesn't file it. No excuse, no request for
4 adjournment. All he does is file it the next day.

5 Your Honor, he has continually done everything in
6 his power to make discovery impossible. That's a breach of
7 the RPCs, Your Honor. All lawyers have an obligation to
8 participate in the discovery process, to expedite it. He has
9 made it more difficult. He has at the last moment in every
10 instance made it impossible to submit a joint submission.

11 THE COURT: And it's a one-way street?

12 MR. EDELL: Yes, it's a one-way street.

13 THE COURT: So what about his allegation that the
14 defense had promised to refine the scope of their discovery
15 requests with regard to the social media information and then
16 did an about-face and refused to.

17 MR. EDELL: That's a lie. It's a straight-out lie,
18 Judge.

19 THE COURT: Really?

20 MR. EDELL: Yes.

21 THE COURT: That never happened.

22 MR. EDELL: That never happened.

23 THE COURT: Okay.

24 MR. EDELL: He was empathetic that this -- when we
25 discussed this subject, he was empathetic that it was an

1 invasion of privacy. You're not entitled to anything.

2 THE COURT: Which isn't necessarily that different
3 than the position that defense took when he issued a similar
4 request. Right?

5 MR. EDELL: Well, Judge, he asked for Judge
6 Schott's social media. How is that possibly relevant?

7 THE COURT: Okay.

8 MR. EDELL: I mean, really. How is that possibly
9 relevant. She's not a defendant in this case. She hasn't
10 waived her rights to privacy with respect to any issues.

11 THE COURT: Okay.

12 MR. EDELL: Well -- I mean, really.

13 THE COURT: So let's continue on -- rather than get
14 sidetracked.

15 So your argument essentially is that that never
16 happened, then that -- there was never an agreement by the
17 defense to refine or revisit the social media or the scope of
18 the social media document and interrogatory requests.

19 MR. EDELL: Absolutely not, Judge. We -- we
20 said -- I said to him, you know, if you want to come up with
21 some -- some mechanism by which to -- to structure this in a
22 way that you can live with, that's fine. We will discuss
23 that. We were willing to discuss it, Judge.

24 But he never got back to me with any such proposal.
25 I wrote him the day after, the day after we met, and I said

1 to him -- I wrote to him --

2 MR. DWYER: Can I just know the date of --

3 THE COURT: Yeah, just to orient all of us.

4 MR. DWYER: We've met multiple times, so I don't
5 know which date he's referring to.

6 THE COURT: Well, hold on. Let me -- let me do it
7 for everybody. So that there's not a bickering between
8 counsel.

9 So I'm -- and I'm looking at plaintiff's brief. He
10 says you met -- the instance he's referring to is May 9th.

11 MR. EDELL: That's correct, Judge.

12 THE COURT: Okay.

13 MR. EDELL: Saturday, May 10, I send him an email:
14 Andy, thank you for the information regarding your
15 communication with Ayub's [phonetic] office regarding its
16 providing records in response to your -- our request. I
17 think we made more progress than you felt occurred
18 yesterday -- during yesterday's meeting. I think that if we
19 both follow up on our respective undertakings, there will be
20 a lot less for Judge Hammer to address, so much so that we
21 might be able to convince him that the remaining issues
22 simply cannot be resolved without court intervention. That
23 being the case, perhaps if presented properly, we might be
24 able to avoid being held captive on the 21st.

25 THE COURT: Okay.

1 MR. EDELL: Okay?

2 And what I said to him, I said, Andy, if you really
3 have such a big problem with this social media, you know what
4 it is, you have access to it. Tell us. What do you propose?

5 I don't know what is there, Judge. How can I
6 reframe it if I don't know what's there? Just like the judge
7 in the federal district court case that I read from
8 Giacchetto said, you know, the defense attorney doesn't know
9 what's there or what's not there. He does. He knows what's
10 relevant and what's not relevant. And I'll bet you dollars
11 to donuts that there's a lot of relevant information there.
12 And he's been stonewalling us on that.

13 THE COURT: All right. We're reverting back to
14 your original arguments. So -- so --

15 (Simultaneous conversation)

16 MR. EDELL: And there's -- there's not one
17 document, Judge, between that 21st and today --

18 MALE SPEAKER: Oh, well --

19 THE COURT: No, between May 9th.

20 MR. EDELL: Between May 9th and the filing of his
21 certification with this brief to try to avoid sanctions to --
22 that -- to suggest in any way that we undertook the
23 obligation to reframe these requests. Not one document. Not
24 one note from him saying, hey, Marc, where's the -- where's
25 the revisions to the social media request that you promised?

1 That's what -- I mean, come on, Judge. You would think that
2 there would be something.

3 And he communicated with the Court on June 9
4 talking about meet and confer and what people have done and a
5 joint submission, et cetera, et cetera. He didn't say I'm
6 waiting for Mr. Edell to provide me with the revised social
7 media request. Why didn't he do that, then, Judge? Why
8 didn't he do it on any of occasions when we were trying to
9 put together a joint submission.

10 Why? It's simple. It never occurred. And it's
11 his only excuse.

12 THE COURT: All right. What else?

13 MR. EDELL: We -- well, the only -- it's -- that's
14 about all I have to say, Judge.

15 THE COURT: All right. Fair enough.

16 MR. EDELL: You're great. You've read all the law.
17 The law in this District is favorable to us in terms of
18 discoverability of social media. I think Judge Hochberg's
19 decision, Magistrate Mannion's decision, and Magistrate
20 Waldor's decision --

21 THE COURT: You're talking about Gatto as well?

22 MR. EDELL: Yes.

23 THE COURT: All right. Okay.

24 MR. EDELL: Make that clear.

25 THE COURT: All right.

1 Mr. Dwyer?

2 MR. DWYER: Thank you so much, Judge.

3 And, Judge, I'm going to try my very best to heed
4 your admonition not to repeat things that are already in our
5 papers. I admit I'll probably stray from that a few
6 occasions to respond to some of the things that Mr. Edell --

7 THE COURT: Here's what I want to focus on first,
8 just to -- just to -- and I want to give you a fair
9 opportunity.

10 MR. DWYER: Yeah, I just want to know. I think
11 that Mr. Edell spoke for about 52 minutes. I would like an
12 opportunity to respond.

13 THE COURT: You're going to have it. Let me --
14 (Simultaneous conversation)

15 MR. DWYER: I don't intend to use 52 minutes or
16 anything like that.

17 THE COURT: -- but I'm the one making the decision.
18 So what I need is certain information.

19 MR. DWYER: Sure.

20 THE COURT: Okay? So this is really as much as
21 anything to assist me. Right?

22 So what I want to focus on first is the substance
23 of the social media --

24 MR. DWYER: Right.

25 THE COURT: -- issue --

1 MR. DWYER: Right.

2 THE COURT: -- because I don't think there's any
3 dispute that the defense is entitled to at least some of it.
4 It's a question of scope. Isn't it?

5 MR. DWYER: Right. Well, our position -- one of
6 the problems with the defendant's argument in their initial
7 brief, anyway, is that it focused on issues of assertions of
8 privilege or confidentially or whatnot. We've never asserted
9 a privilege in response to these requests. Our response to
10 these requests were that they were overbroad, they were
11 unduly burdensome, and they were not particularized enough.
12 And the requests that the defendants made in this case are
13 broader than several cases that we cited to Your Honor where
14 the motion to compel was denied because they don't even throw
15 in the phrase at the end "related to this case," or "related
16 to the issues in this case." They simply say we're entitled
17 to all social media from November 1, 2012, presumably to the
18 present. There's no end date. Period. So there's no
19 limitation on that whatsoever. And that's the problem. With
20 the request --

21 THE COURT: Well, let's start with an even more
22 basic premise. Do you agree that there's nothing about
23 social media that makes it necessarily special or to be
24 handled differently than other discovery?

25 MR. DWYER: Absolutely. And the --

1 THE COURT: Okay.

2 MR. DWYER: -- and like any --

3 THE COURT: So it's essentially a relevance
4 analysis. Right?

5 MR. DWYER: Well --

6 THE COURT: It's a Rule 26 analysis.

7 MR. DWYER: It's a -- it's more than just
8 relevance. It's that they have to draft their discovery
9 demands in a way that would put us -- intelligent person on
10 notice of what they want. And unless you buy their argument
11 that they are entitled to everything, every posting, every
12 private communication, every picture, every group that she
13 joined, everything, then they haven't done that. They have
14 never put us on notice of what the heck they want.

15 And I'd really like to respond to something, if I
16 could --

17 THE COURT: Hold on. Hold on. I have one other
18 question, though. Your client has clearly put her
19 psychological state into play. Right? I mean she took --
20 she put it into play in the course of taking leave at certain
21 times, not all -- not all the time.

22 MR. DWYER: I agree --

23 THE COURT: But at certain --

24 MR. DWYER: -- the short answer is I agree.

25 THE COURT: And seeking -- and claiming that part

1 of her damages was emotional distress.

2 MR. DWYER: I agree with you.

3 THE COURT: So if she's done that, doesn't
4 Mr. Edell have at least some argument that various postings,
5 for example, are relevant because if she can write something
6 that's reasonably coherent, does that bear on her ability to
7 focus or concentrate?

8 MR. DWYER: Well --

9 THE COURT: And wouldn't that make it relevant?

10 MR. DWYER: -- and that is why we cited the cases
11 that we cited to Your Honor because those cases reject the
12 idea that you get every posting because the person claims
13 that they suffer from emotional distress damages. And so we
14 cited to Your Honor the Giacchetto -- or however you
15 pronounce it -- case.

16 THE COURT: Right.

17 MR. DWYER: And we did not miscite that case. We
18 absolutely accurately cited that case. The court rejected
19 the idea that just because somebody is seeking emotional
20 distress damages, that entitles you to their entire social
21 networking account because she might say something like,
22 isn't it a beautiful day today. And I'm quoting from the
23 court at 293 F.R.D. 112, the jump cite 115, quote: Thus a
24 plaintiff's entire social networking account is not
25 necessarily relevant simply because he or she is seeking

1 emotional distress damages. Unquote.

2 And the [case citation] case, that we previously
3 cited in our brief as well, same issue there, the exact same
4 issue there. In that case, the defendant asked for any
5 content that would relate to the emotion, feeling or mental
6 state of the plaintiff, on a quote and unquote, because --
7 related to damages, and the court said, no, that's just too
8 ridiculously broad -- overbroad.

9 And the thing is their request isn't even limited
10 to that. Their request is just everything.

11 So it doesn't matter whether it relates to
12 emotional distress. It doesn't matter if it relates to her
13 whereabouts. It doesn't matter what it is. They just want
14 every -- you know, their Document Request Number 78 wants
15 every photo and every video. Every single one. So she posts
16 a cat video, she's got to -- you know, put the cat -- give
17 them the cat video.

18 And there's no case that holds that.

19 And can I please respond to this one thing that
20 Mr. Edell mentioned about the scope issue, because --

21 THE COURT: Sure, it's on the -- it's on the scope
22 of the social media.

23 MR. DWYER: Yeah, and it's something that wasn't in
24 my initial brief because he just said it today, okay, so it's
25 a new thing. Okay? He denies that this happened.

1 Now, I brought my handwritten notes from my meeting
2 with Mr. Edell and Mr. Nestor in my office, and because they
3 don't contain any attorney-client communication and I don't
4 believe they contain any strategy on my part, I'm happy to
5 give them to you and to Mr. Edell right now. And I'd like to
6 do that, just as he was able to hand up a little calendar
7 that he made up.

8 THE COURT: You can, but I mean, you can give it to
9 Mr. Edell. I'll accept whatever representation you want to
10 make. I don't know that your notes of what you're about to
11 tell me are any different than what you're telling me under
12 oath.

13 MR. DWYER: Well --

14 THE COURT: You're not under oath, but as an
15 officer of the court.

16 MR. DWYER: That -- to the extent my credibility
17 was -- don't believe anything I say, I want you to be able to
18 see this.

19 THE COURT: Okay.

20 MR. DWYER: And so Mr. Nestor and Mr. Edell and
21 myself sat down in my office on May 9th. We were there for
22 several hours. We went over a variety of issues. We started
23 with the phone records issue, because that was one of the
24 more contentious things.

25 And then you see on page 4, we got to the

1 defendant's deficiency letter. And I first handwrote was
2 impasse except where noted; in other words, I was noting the
3 areas where we might try to find agreement.

4 And you'll turn to the next page, and DR 79, that's
5 the document request I cite in my brief. That's the document
6 request that we're talking about today. That's what this
7 motion is all about. I know that Mr. Edell wants to talk
8 about other discovery issues. But the only thing he's filed
9 a motion on related to social media. And so this was the
10 document request that says give us everything from all your
11 social media accounts. And I wrote what they told me they
12 would do, they said we'll reframe it. That's why it says
13 "will reframe."

14 I met with these gentlemen again on May 13th and on
15 May 21st. And I have, by the way, notes for those meetings
16 too. But at any rate, on those two meetings, nothing came up
17 about the social media issue. They didn't change their mind.
18 They didn't say, you know what? Actually, we do want all of
19 your Facebook regardless of what it is, regardless of what it
20 relates to. They said we will reframe.

21 And so on May 13th, I don't have any reason they're
22 not going to reframe. On May 22d, I don't have any reason to
23 think they're not going to reframe. We met three times.

24 And then on May 28th, I get the letter that I annex
25 to my certification from Mr. Edell to me, and when he gets to

1 Document Request 29 -- 79 -- sorry, Document Request
2 Number 79, he completely reneges. And instead he just
3 recites the document request in its original form, which is
4 all social media. And he says we're entitled to all of it.
5 So he completely reneges on his position. He's never once
6 backed off the position, and he doesn't back off on it today
7 now, that he wants everything.

8 And all I said to him, says, look, you've got to
9 give me some idea of what you're looking for and why, which
10 by the way, we did with the phone records. With the phone
11 records, we marched through it practically day by day as to
12 why he wanted the phone records on a particular day. You
13 know, well, I think this relates to whether she was in
14 Virginia or not, or I think this relates to his argument
15 before she ever went on the leave. It relates to whether she
16 properly took vacation time or not, and so forth and so on.
17 We went through that day by day so that I could understand
18 why he claims he wanted stuff -- some of the stuff I agree
19 with him on. And some of it, I didn't agree with him on.

20 On the Facebook stuff, I said, look, it can't be
21 all the Facebook. There has to be some reason why you want
22 this stuff. And I am not the defendant. And it is not my
23 job to figure out what you want. It's your job to tell me
24 what you want. That's what the discovery rules require. The
25 discovery rule requests have to be framed in a way that --

1 with sufficient particularity to put the other party on
2 notice of what is being asked, so they can intelligently
3 respond. And just saying we want all the Facebook stuff is
4 not that.

5 So the reason we're here today, reason why this
6 motion was filed is because defense counsel has stubbornly
7 insisted since the time that they filed their -- served me
8 with their document demands, they've stubbornly insisted that
9 they're just entitled to all of the Facebook without
10 limitation whatsoever, without any connection to any issues
11 in the case opinion they don't have to explain why they want
12 it.

13 And that's wrong. That's clearly wrong under the
14 case law.

15 And that's the second thing, if I may, that I could
16 respond to that is absolutely not in my brief, because they
17 claim that they have all this authority that supports them,
18 and that's just baloney, and I'm going to give you just a
19 couple of examples to just show you that.

20 If you look at page 12 of their brief, they cite a
21 case called EEOC v. Simply Storage Management. It's a
22 published case, although they didn't have the published cite.
23 But it's been -- now a published case, 270 F.R.D. 430. They
24 cite that case and they describe, this is the holding. This
25 is a bare description of the holding.

1 THE COURT: I have it. I have it in front of me.

2 MR. DWYER: Requiring the plaintiffs to produce
3 their entire social media profiles in response to the
4 defendant's discovery request, unquote.

5 I have a copy of that decision here. I'm assuming
6 Your Honor's already read it or that your law clerk has
7 already read it --

8 (Simultaneous conversation)

9 THE COURT: Yes, it was -- it's appended as
10 Exhibit Y.

11 MR. DWYER: Absolutely a false description of what
12 happened in that case. In that case, the court asked that
13 certain items, certain items from the social media profile be
14 disclosed relating to emotional distress damages and
15 moreover, left it to plaintiff's counsel to determine, in the
16 first instance, what would and would not be produced. And
17 the Court specifically rejected the argument -- their
18 argument Mr. Edell's making here that they should get
19 everything from plaintiff's social media. The discovery
20 requests that they rejected as too broad in the Simply
21 Storage Management case are actually narrower than
22 Mr. Edell's requests. And now I'm quoting from the decision:
23 Although as noted above, the contours of social
24 communications relevant to a claimant's mental and emotional
25 mental health are difficult to define, that does not mean

1 that everything must be disclosed. Simply Storage has cited
2 one decision in which the court did require production of the
3 plaintiff's entire SNS -- social networking site -- profile,
4 but that case is distinguishable in a number of ways.

5 And then after, it explained why they weren't going
6 to follow that case, the court went on to say: Moreover, the
7 simple fact that a plaintiff has had social communications is
8 not necessarily probative of the particular mental and
9 emotional health matters at issue in this case. Rather, it
10 must be the substance of the communication that determines
11 relevance. To be sure and --

12 THE COURT: Well, I understand that. But that's
13 not necessarily different than what Mr. Edell argued. Isn't
14 it? In other words, for example, it doesn't -- doesn't
15 relevance here turn to some degree on -- and we keep talking
16 about social media as though it's somehow qualitatively
17 different --

18 MR. DWYER: I don't say that. I don't say that.

19 THE COURT: At the end of the day, it's a relevance
20 issue. Right? Sorry, not an -- it's an -- it is a relevance
21 issue.

22 MR. DWYER: I'm merely pointing out that he cites
23 this authority for the proposition that --

24 THE COURT: I understand that.

25 MR. DWYER: -- I can be required to hand over the

1 entire social media site, and the court rejects that. He
2 deliberately miscites that case to the Court.

3 He -- he claims he has New Jersey authorities. No,
4 he does not. He cites the Gatto case, which is a unpublished
5 District of New Jersey case. In that case, the plaintiff had
6 consented to disclose her social media. There was no ruling
7 on it. And then the plaintiff deactivated it and deleted the
8 whole thing. And that was the issue in that case.

9 THE COURT: That case is a little bit different.

10 (Simultaneous conversation)

11 THE COURT: The plaintiff claimed that --

12 MR. DWYER: That's -- that's not what happened in
13 this case.

14 THE COURT: The plaintiff claimed that -- they were
15 going through apparently a nasty divorce, and somebody --

16 MR. DWYER: And they made a mistake, they said.

17 THE COURT: Yeah. So --

18 MR. DWYER: And -- but that's -- what's that got to
19 do with this case? He cites this case --

20 THE COURT: Let's focus on -- otherwise, we're
21 going to be here all night. And we're not -- I can guarantee
22 you both, we're not going to be here all night.

23 MR. DWYER: I don't want to be here all night. I
24 want to correct his claim that he's got New Jersey authority.
25 He doesn't have any --

1 THE COURT: You know what, though? Part of my
2 frustration in this case is -- is that counsel in this case
3 are more interested in saying -- in pointing out the various
4 issue- -- areas where they think the other side has been
5 disingenuous than in focusing on the substantive issue.

6 The substantive issue here is where do you draw the
7 line. Right? Clearly there is at least some social media
8 that needs to be produced. The question is how much?

9 MR. DWYER: Can I answer that question?

10 THE COURT: Yes, and don't -- don't answer it in
11 the way of he's telling you this and he's misleading -- just
12 give me your position.

13 MR. DWYER: I'm -- I want to answer that.

14 THE COURT: I don't want mutual recriminations. I
15 want substance.

16 MR. DWYER: I am not -- I am not going to
17 recriminate. I'm going to answer your question, Judge.

18 THE COURT: Okay.

19 MR. DWYER: Okay? The way you do that is you have
20 two people sit down in a room, and you say, well, come on,
21 you can't have the social media, what do you want? I am not
22 a mind reader. What do you want exactly? And tell me why.
23 Which is exactly what we did with the phone records. And if
24 you want to march day by day, month by month, so, you know,
25 let's just for the sake of discussion that whole description

1 that he gave at the beginning of his oral presentation was in
2 the record.

3 THE COURT: About the cell site records?

4 MR. DWYER: About the cell site records and object
5 her having to get Judge Schott permission to go on vacation
6 and all that stuff. None of that's in this record. None of
7 it. The only thing that's in this record are the few
8 Facebook pages that Your Honor noted. That's it. Everything
9 else that he said factually, including this calendar, is not
10 in this record. Not --

11 THE COURT: Okay. What you've just -- you realize
12 what you're doing.

13 (Simultaneous conversation)

14 MR. DWYER: But let's assume it is --

15 THE COURT: You're inviting him to expand these
16 proceedings exponentially because there's no --

17 (Simultaneous conversation)

18 THE COURT: Hold on. Just look at this
19 realistically. Do you really think Mr. Edell, a
20 well-esteemed officer of this Court, is going to represent
21 that the cell site records show one thing when they actually
22 show something different?

23 MR. DWYER: I think the cell site records are more
24 ambiguous than he understands.

25 THE COURT: All right. That's an issue for another

1 day. Go ahead.

2 MR. DWYER: I agree. I agree.

3 I'm just saying, though, let's assume for the sake
4 of discussion that that's true. So then, as Your Honor
5 pointed out, so, okay --

6 THE COURT: And I don't have to decide that in any
7 event to decide the relevance of the social media.

8 MR. DWYER: No. But it's -- it goes to the
9 discovery issue, because, for example, if her whereabouts is
10 at issue -- I'm just going to pick up a date range -- if her
11 whereabouts is at issue from December 10th to December 22d,
12 then that would be an argument for getting the Facebook pages
13 for those days to the extent they reveal anything about her
14 whereabouts.

15 THE COURT: Right.

16 MR. DWYER: Right? But if her whereabouts is not
17 at issue -- and, again, I'm going to make up a date range --
18 for the month of February, right, if her whereabouts are just
19 not an issue there, then why do you need the Facebook pages
20 that would disclose something about her whereabouts?

21 Everybody agrees she was on a leave at that time. Everybody
22 agrees she was on FMLA -- approved FMLA leave at that time.

23 Likewise, take the emotional distress issue. So,
24 for example, you have a case that he quoted at great length
25 that says if the Facebook posting says something specifically

1 about the person's emotional distress or it says something
2 specific about her allegations in this case, or it says
3 something specific about alternate stressors, alternate
4 causes of emotional distress, okay, that could be relevant to
5 emotional distress.

6 THE COURT: So if he -- if they were refined to
7 saying along the lines of produce among other things, any
8 communications or content reflective of other stressors other
9 than her work, for example, you're not going to come back and
10 argue that that's vague or unduly broad.

11 MR. DWYER: I would -- I would write it, you
12 know --

13 THE COURT: Because that's the condrum [sic] that
14 he face -- that the defense faces. Right?

15 MR. DWYER: Well, wait, I don't understand the
16 condrum [sic]. Why couldn't he just write a more specified
17 request?

18 THE COURT: Specify -- more specific than what I
19 just heard --

20 (Simultaneous conversation)

21 MR. DWYER: No, no, more specified than what he
22 gave me.

23 THE COURT: I guess -- that's -- well, that's --
24 no. Answer my question. Don't ask me a question.

25 In other words, if the -- if the interrogatory said

1 for X period, say, I don't know, I'm just -- plucking dates
2 out of thin air --

3 (Simultaneous conversation)

4 MR. DWYER: Right, like, let's say when she was on
5 disability --

6 (Simultaneous conversation)

7 THE COURT: January 1 through January 18th, 2013,
8 any and all content pertaining to other stressors in the
9 plaintiff's life or any stressors or sources of anxiety in
10 the plaintiff's life.

11 MR. DWYER: Yeah, I mean the way that the court in
12 the Giacchetto case put it, was they said: Thus, any
13 postings on social network sites that refer to an alternative
14 potential stressor.

15 THE COURT: Right.

16 MR. DWYER: Okay?

17 THE COURT: Now, look, with all due respect to my
18 colleague in the Eastern District of PA -- I think that was
19 E.D. Pa. Right?

20 MR. DWYER: The Giacchetto case?

21 THE COURT: Yeah.

22 MR. DWYER: It was actually the Eastern District of
23 New York.

24 THE COURT: New York, I'm sorry.

25 MR. DWYER: It was Kathleen Tomlinson's.

1 THE COURT: Yeah. All I'm wondering is -- is --
2 does that invite -- look, in that case, if the judge ordered
3 it, it's one thing. But does that invite a subsequent fight
4 over what's within the scope of that discovery request or
5 what's outside the scope of that discovery request? Because
6 even that -- and this may be an area that doesn't lend itself
7 to much precision. That's what I'm wrestling with.

8 MR. DWYER: Well, let me -- if I may, let me try to
9 address that specific issue.

10 The court dealt with that question in another case
11 that both of us cite, which is this Mackelprang v. Fidelity
12 National Title Agency. He cites it on --

13 THE COURT: That's the District of Nevada case.
14 Right?

15 MR. DWYER: Yes.

16 THE COURT: Right.

17 MR. DWYER: And he cites that case, and we cite it
18 as well.

19 And what the court said in that case was, look --
20 and all the courts say this -- look, the way you do this when
21 there's any kind discovery request -- and, again, social
22 media's not treated differently than anything else. It's the
23 same as any other type of discovery. And so what you do in
24 that case is you require the plaintiff's counsel in the first
25 instance to review the documents and figure out what is

1 responsive and what is not. And then they produce that.
2 Okay? And then, if there's an issue that comes up later on
3 where somebody says, oh, we have evidence that there was an
4 underproduction here, we have evidence that something was
5 withheld here, then that presents a different issue for the
6 court.

7 But what the court said in Mackelprang is what
8 we're not going to do is (A) we're not going to just give the
9 defendants everything and let them look at it and let them
10 decide what's relevant or who's not, because that's no
11 different than saying, I want to see any papers in the
12 plaintiff's house that might relate to emotional distress, so
13 give me the key to her house so I can go in and rummage
14 around. It's exactly the same thing. It's no different than
15 saying, I want to see everything on the hard drive of your
16 computer that might reveal emotional distress. So give me a
17 complete mirrored copy of your hard drive so I can look
18 through it and see what's there.

19 So that's the first thing you're not going to do.

20 And the second thing you're not going to do, the
21 court says, is you're not going to have an *in camera* on this.
22 *In camera*'s for assertions of privilege. It's not about
23 issues of relevance. And that's what this -- as Your Honor's
24 pointed out several times -- that's what this is about. It's
25 is about relevance. We've never asserted a privilege on this

1 discovery request. That's why we've never produced a
2 privilege log for it, because we don't claim any of this. We
3 don't claim something is privileged. We don't claim --
4 attorney-client is obviously privileged. But that's not the
5 issue here.

6 THE COURT: But at the end of the day in -- in
7 Mackelprang, right, the issue is still one of relevance. In
8 other words, the issue is whether the plaintiff's outside
9 sexual relations, if any, in other words, outside the
10 workplace, had new relevance to the hostile workplace sex
11 discrimination claim. And the social media -- the scope of
12 permissible social media simply followed that proposition.
13 Right?

14 MR. DWYER: I'm sorry, Judge, I don't understand
15 what you just asked me.

16 THE COURT: I thought Mackelprang essentially held
17 that there you had a plaintiff who was bringing hostile
18 workplace sex harassment claims. Right?

19 MR. DWYER: Yes.

20 THE COURT: And the scope of the discovery the
21 defense wanted was essentially any email communications --
22 because she had -- apparently she had two different
23 Myspace --

24 MR. DWYER: There was --

25 THE COURT: -- accounts. Right?

1 (Simultaneous conversation)

2 THE COURT: One where she represented herself as
3 single and not interested in kids.

4 MR. DWYER: Correct.

5 THE COURT: The other one where she represented
6 herself as married, loving mother of six kids.

7 MR. DWYER: Right.

8 THE COURT: Something like that.

9 MR. DWYER: Correct.

10 THE COURT: The defense wanted all email
11 communications concerning sexual relationships both --

12 MR. DWYER: Right.

13 THE COURT: -- inside and outside of the workplace.

14 MR. DWYER: Right.

15 THE COURT: The court said, wait a minute. There's
16 a distinction to be drawn, including under Fed. R. Evid. 412.

17 MR. DWYER: Right.

18 THE COURT: And under Fed. R. Evid. 412 and under
19 Supreme Court precedent, in-office sexual activity is
20 relevant because it goes to the core of the sexual host- --
21 or the hostile workplace claim.

22 If she's engaging, though, in some affair or
23 something outside of the office --

24 MR. DWYER: Yeah.

25 THE COURT: -- not -- outside of employment, not

1 relevant. And the social -- the scope of the social media
2 that was allowed in that case --

3 MR. DWYER: Was after she left.

4 THE COURT: -- followed that.

5 MR. DWYER: Right.

6 THE COURT: Right.

7 MR. DWYER: Right. But that's not the only thing
8 the court held. That's not the only thing the court held,
9 because they also raised the issue of damages in that case.
10 It was the same damages argument that Mr. Edell is making.

11 So after they got done with that, the defendants
12 said, well, it also might -- I'm quoting now -- in addition,
13 defendant argues that the private email messages may contain
14 information that plaintiff's alleged severe emotional
15 distress was caused by other factors other than defendant's
16 alleged sexual harassment misconduct, unquote.

17 And the court goes on to say: Well, that's nice,
18 but that doesn't give you the right to her entire social
19 media profile. What you can do is you can draft a narrower
20 and more specific discovery request, but not this.

21 And going to the jump cite -- I think it's on
22 page 25 --

23 THE COURT: 25 to 26, actually.

24 MR. DWYER: Yes.

25 The proper method for obtaining such information,

1 | however, is to serve upon plaintiff properly limited requests
2 | for production of relevant email communications. Nothing in
3 | this order prevents defendants from serving such discovery
4 | requests on plaintiff to produce her Myspace.com private
5 | messages that contain information regarding her sexual
6 | harassment allegations in this lawsuit or which discuss her
7 | alleged emotional distress and the cause thereof.

8 | It seems pretty straightforward to me. And that's
9 | exactly the situation we're having here. And if we had
10 | gotten such a request -- and this is not a sexual harassment
11 | case, it's not about sexual harassment. And we -- if we had
12 | gotten a request saying, let's see your private Facebook
13 | postings or messages that relate to your claims of emotional
14 | distress in this case and your claims it was caused by the
15 | defendant or going a little bit farther with the Giacchetto
16 | case, other stressors that would have been -- that would be a
17 | totally different request. It would be a totally different
18 | request.

19 | We didn't get that request. And when I met with
20 | them the first time on May 9th, and I said, come on, guys,
21 | this is overbroad. You know it is. Can you give us a more
22 | narrower request. I don't -- I don't know what you're
23 | looking for.

24 | Frankly, when we had the discussion about the phone
25 | records and why they were supposedly looking for the phone

1 records on particular dates, I was surprised by some of the
2 explanations that Mr. Edell gave me. That doesn't mean the
3 explanations are bad or evil. But they weren't explanations
4 that ever crossed my mind in a million years. And so when he
5 gave me some of those explanations, I was, like, well, I
6 didn't know that's what you were looking for or why you were
7 looking for it. And some of those explanations, I thought
8 were persuasive and some of them I didn't, and for the ones
9 that I didn't, you know, we're at an impasse on that.

10 But -- but with the Facebook, all I got on May 9th,
11 and I -- not only is it in my notes, but I distinctly
12 remember the whole encounter because Mr. Edell and I were
13 sitting across from each other at the table, and Mr. Nestor
14 was sitting on the end, and when I said, come on, this is
15 overbroad and you know it -- Mr. Nestor was taking notes
16 throughout the whole meeting, Mr. Edell was not, and
17 Mr. Edell looked at Mr. Nestor and Mr. Nestor looked at
18 Mr. Edell and they kind of both shrugged, and Mr. Edell said,
19 okay, you know what? We'll reframe it. And I thought,
20 great. I'll wait till your -- I get your reframed requests,
21 and I'll respond to it when I get it. No problem.

22 And then I get this letter after two more meetings
23 where nobody changed their mind, I get this letter on
24 May 28th that pretends the whole conversation never happened.

25 THE COURT: All right --

1 MR. DWYER: What am I supposed to do with that?

2 THE COURT: Putting aside the mutual
3 recriminations, let's move forward. I think -- I think --

4 (Simultaneous conversation)

5 MR. DWYER: Am I able to respond to this --

6 THE COURT: -- we've covered the social media side.
7 Right?

8 MR. DWYER: There's a lot more that I would love to
9 say, but I understand Your Honor's not -- desire not to stay
10 here all night. So I totally understand that.

11 THE COURT: Let's keep in mind a couple things.
12 One, this is an issue in which the parties have been going
13 around and around and around. Two, contrary to the Court's
14 normal practice, I allowed you folks to do a full-on motion
15 with full briefing. If it hasn't been covered in that -- and
16 I -- as I've said and I meant what I said and I think I've
17 already shown this, I've read everything. So if there's
18 something else you want to point out, fine, but -- but let's
19 move forward.

20 MR. DWYER: Well, I do want to point out one other
21 thing here, which is especially related to this issue of
22 emotional distress.

23 Try to remember -- and I don't think this is in the
24 papers, they have gotten without any problem from me, they
25 have gotten access to all her medical records from a variety

1 of different providers. And they have never deposed any of
2 those providers. They've never asked the plaintiff a single
3 question. You know, there's good authority that says when
4 you're talking about some wildly overbroad requests like
5 this, all social media without any limitation whatsoever, why
6 don't you try a couple of other tools first to see what it
7 gets you before you go off to the races with sorting
8 through -- you know, I don't how many hundreds of thousands
9 of pages it's going to be.

10 THE COURT: I'm sorry, hold that thought. We'll go
11 off the record for a moment. I need a two-minute break just
12 to check on something.

13 (Recess: 4:48 P.M. to 5:10 P.M.)

14 THE COURT: All right. We are back on the record.
15 I apologize for the interruption. I had to handle another
16 matter.

17 So, Mr. Dwyer, you were continuing.

18 MR. DWYER: Thanks. I just wanted to address --

19 THE COURT: Go ahead.

20 MR. DWYER: Oh, it is okay? I just want --

21 THE COURT: We're just trying to access my -- a
22 library -- here, but go ahead.

23 MR. DWYER: Okay. I just -- that as far as the
24 discovery issue is -- you know, I agree with Your Honor, it's
25 been briefed.

1 I would like to address the sanctions issue, if I
2 may.

3 THE COURT: Go ahead.

4 MR. DWYER: Okay.

5 So there's three asserted bases for sanctions here.
6 The first basis is the claim that sanctions should be imposed
7 simply because we objected to this discovery demand. And,
8 again, the only discovery demand that is before the Court is
9 the discovery demand for social media discovery.

10 Our objection is completely correct. It's
11 completely well-founded. We tried to work this out with the
12 defendants. We thought we were going to get a reframed
13 request. We never did. The request, as it stands right now,
14 it doesn't even have the limiting language on it related to
15 this case, much less something that every court that we've
16 cited would require. Is an improper demand. It's not an
17 improper demand because it seeks privileged information; it's
18 an improper demand because it's overbroad. And our objection
19 is correct.

20 But even if it wasn't correct, all we have to do is
21 be substantially justified. There's no basis for imposing
22 sanctions there.

23 This idea that there should be some kind of
24 sanction imposed for the destruction of evidence --

25 THE COURT: Well, I think -- I think the defense

1 has -- I don't need you to address that.

2 MR. DWYER: Well, I want to address one thing
3 because of the third basis for the sanction that relates to
4 that. The defendants cite in their brief on page 25 and I'm
5 quoting: It is clear that plaintiff in the instant action
6 intentionally destroyed evidence he knew was relevant to this
7 case, unquote.

8 That's a very serious accusation to level at me or
9 at my client. And they have no factual basis for it
10 whatsoever. I don't think that an attorney who is going
11 around making reckless accusations like that -- and they know
12 they have no basis for it, Mr. Edell's admitted -- one of the
13 things he admitted is he had no basis for making that
14 accusation. I don't think an attorney like that should be
15 asking for sanctions. That's the kind of conduct that I
16 think is sanctionable, quite frankly, accusing somebody of
17 destroying evidence when they have no basis for believing
18 that it's true.

19 THE COURT: All right. But nor have you made
20 either a Rule 11 application or a § 1927 application. Right?

21 MR. DWYER: Because you know what -- you know why?

22 THE COURT: No, no, I am not -- I just -- I want to
23 move this along.

24 MR. DWYER: Because my focus is on the discovery.

25 THE COURT: Fine.

1 MR. DWYER: Their focus is trying to sanction me.
2 That's the goal here today.

3 THE COURT: What about -- what about the failure to
4 appear for that conference? Now, I know you've admitted --
5 and you've been rather candid that there was a mistake and
6 that your office for some reason wasn't aware of it. I don't
7 think you've seriously contested that you received the ECF
8 notice --

9 MR. DWYER: I did.

10 THE COURT: -- because it was docketed.

11 MR. DWYER: I did get the ECF notice.

12 THE COURT: Okay.

13 MR. DWYER: In my inbox in my email. That's
14 absolutely correct.

15 THE COURT: Doesn't Rule 16(f) provide a more than
16 adequate basis for sanctions here, if only not because of
17 willful misconduct, but because at the end of the day to
18 level the playing field, because the defense showed up to --
19 in compliance with the order and you didn't.

20 And I understand you're going to argument [sic] --
21 well, you're going to argue, the conference went ahead
22 anyway, Judge. But had they known you weren't going to show
23 up and had the Court known you weren't going to show up, I
24 might very well have let them participate by phone. Right?
25 So -- so are they entitled to some recompense under

1 Rule 16(f)? And does Rule 16(f) actually compel me to impose
2 sanctions -- just -- I'm focusing now on just the
3 nonappearance, without regard to willful failure to comply.

4 MR. DWYER: I understand what Your Honor is focused
5 on. I -- this is why I don't think it would be appropriate.
6 I think it's within your discretion, and this is why I don't
7 think it would be appropriate.

8 I have an explanation for what happened. I agree
9 that I made a mistake. But the explanation for what happened
10 is simply that I was starting a brand-new trial, that
11 according to the trial judge presiding over it, was expected
12 to go for six weeks. It was a massive trial. I was working
13 day and night on that case. I was working day and night in
14 the week leading up to it and the weekend before. And that
15 week leading up to it, quite frankly, was one week in between
16 a trial I had just finished, and in the week leading up to
17 it, I had four depositions and a court appearance. I mean,
18 this was ridiculous. I was working ridiculous hours. I was
19 putting in, you know, 20 hours a day; frankly, on some of the
20 days I was putting all-nighters. I made a mistake. And I'm
21 very sorry that I made a mistake. But that's all it amounts
22 to.

23 And I don't know what Mr. Edell's life experience
24 has been like as an attorney. I know he's been an attorney
25 longer than I have. But in the 24 years that I've been an

1 attorney, I've seen attorneys blow things like that. I've
2 shown up to court for oral arguments, I've shown up to court
3 for status conferences, and I've seen attorneys make those
4 mistakes. They -- their office miscalendared it or they
5 thought somebody else was covering it or whatever. They
6 screwed up and they made a mistake. And every single time
7 I've seen that, including when I was the one involved, in
8 other words, it was my adversary who wasn't showing up plus
9 all the other times when I've been sitting in court for an
10 oral argument on a motion and seen attorneys make that
11 mistake, every single time that has happened, the other side
12 doesn't say, sanction him, sanction him. The other side
13 says, Judge, I don't know where Mr. Jones is, but I'll go
14 call him on my cell phone and see if I can track him down.
15 And the judge says, okay. And then they track down
16 Mr. Jones, and then they say, well, Mr. Jones, what happened,
17 and Mr. Jones, says, you know what? I made a mistake. I
18 screwed up. And they say, okay, we're going to plug you in
19 by conference call then, and we'll do the motion that way or
20 we'll do the conference that way.

21 And the person is plugged in by conference call,
22 and the proceeding goes forward.

23 And nobody ever in 24 years -- and I've seen this
24 happen, I'm afraid I've seen it happen dozens of times, I've
25 never seen anybody get sanctioned for this, and I've never

1 | seen anybody suggest it, and quite frankly, if it happened on
2 | the other direction, I would never suggest it. I would never
3 | say that Mr. Edell should be sanctioned if he made a mistake
4 | and didn't show up.

5 | So that's what happened. I didn't do anything
6 | maliciously. I didn't do anything intentionally. Why would
7 | I do that?

8 | THE COURT: No, I understand that. And I am not
9 | saying you did.

10 | But does Rule 26(f) require malice or willfulness?

11 | MR. DWYER: I don't think it requires -- I don't
12 | think it deprives you of discretion --

13 | THE COURT: Right. I have discretion --

14 | MR. DWYER: -- to decide whether or not --

15 | THE COURT: -- either way, don't I?

16 | MR. DWYER: Correct.

17 | THE COURT: Okay.

18 | MR. DWYER: And I'm simply saying to Your Honor why
19 | I believe the discretion should be exercised not to impose
20 | sanctions.

21 | I really think that the motivation behind this
22 | motion was just to be able to sanction me to gain some kind
23 | of psychological edge. I think that's what this is all
24 | about. Because if this was about the social media stuff, if
25 | that's what it was all about, this is something that could

1 have and should have been worked out three months ago by
2 Mr. Edell simply drafting a more focused request, which he
3 had said he was going to do.

4 THE COURT: Well -- okay. What else do you have?
5 I mean, that -- I -- I can already make Mr. Edell's argument,
6 which is he's going to go back to the extensive give-and-take
7 in the May/June/July time frame and your failure to respond
8 in part -- as partly contributing to a cresting at this
9 point.

10 MR. DWYER: But it's not true. We did discuss it
11 in May. We went over this issue. And --

12 THE COURT: I'm talking about the joint letter
13 requirement.

14 MR. DWYER: Sure. But when this particular issue,
15 which is the subject matter of this motion, the social media
16 issue, on this particular issue, the way we left it was he
17 was going to try to come up with a more focused request. And
18 the --

19 THE COURT: An assertion he flatly denies.

20 MR. DWYER: Yeah, I -- I'd like to see Mr. Nestor's
21 note of that meeting in May --

22 THE COURT: Well --

23 MR. DWYER: I mean, you know, really we're getting
24 quite along the path of a conspiracy theory, if Mr. Edell is
25 going to say that I took these notes and made them all up and

1 fabricated it when I said under the discovery request under
2 7 -- 79, you know, defendants will reframe the request.
3 That -- that's, you know, really going quite far afield.

4 Obviously, if Your Honor thinks that that's what I
5 did, you know, then I can understand why you credit
6 Mr. Edell's argument that I should be sanctioned, because
7 here I have gone and made up handwritten notes for the
8 meeting.

9 There's no question in my mind -- it's not like I
10 have a recollection problem here. There's no question in my
11 mind that they said they were going to reframe that request.
12 And quite frankly, it's a little odd for them to say
13 otherwise, because they can't defend their request as
14 written. The request as written is clearly improperly
15 overbroad. It has no limitation on it whatsoever. And
16 there's no case law that they have that supports such an
17 overbroad request.

18 THE COURT: All right.

19 MR. EDELL: Your Honor, can I just be heard very
20 briefly?

21 THE COURT: No.

22 MR. EDELL: Please?

23 (Conclusion of excerpted proceedings at 5:19 P.M.)
24
25

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 68 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

5th of August, 2014

Signature of Approved Transcriber

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